United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-2001

To be argued by
ALAN SCRIBNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2001

UNITED STATES OF AMERICA,
Appellee,

—v.—

JAMES WRIGHT,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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UNITED STATES OF AMERICA, :

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JAMES WRIGHT,

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Appellant.

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APPELLANT'S BRIEF

James Wright appeals from an order of the United States District Court for the Southern District of New York (74 Civ. 4093 (pro se), Hon. Henry F. Werker, D.J.), entered October 25, 1974, denying without a hearing the appellant's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2255.

Preliminary Statement

Indictment 70 Cr. 937 charged the appellant and one Dolores Glover with seven counts of receiving, concealing and facilitating the transportation of narcotic drugs, and conspiracy to do the same, in violation of Title 21, United States Code, Sections 173 and 174.

The case of Dolores Glover was severed before trial, as were counts 1, 2, 6 (cocaine counts) and 7 (conspiracy). Wright was tried alone on counts 3, 4 and 5, all charging substantive violations with respect to heroin.

Wright was tried in the United States District Court for the Southern District of New York (Croake, D.J. and a jury). He was convicted on counts 3 and 4, while the jury could not reach a verdict on count 5, which count was subsequently dismissed. On June 16, 1971 Wright was sentenced to ten years in prison.

On direct appeal the judgment was affirmed by this Court. United States v. Wright, 466 F.2d 1255 (2d Cir. 1972) and certiorari was denied, 410 U.S. 916 (1973).

Statement of Facts

The facts of this case are particularized in the opinion of this Court on the direct appeal. 466 F.2d 1256, supra. Essentially, Wright was arrested on October 6, 1970 at 146 West 120th Street (the apartment of one Dolores Glover) and drugs were found in the apartment. The arrest was a culmination of an eight-month investigation of the drug activities of one Eugene Lawson in Philadelphia and New Jersey. Lawson, who was prosecuted in the Third Circuit, became the subject of electronic eavesdropping as a result of three sets of wiretap orders, in March, April and September of 1970. These interceptions and surveillance led to the discovery of Wright, through overhearing of a telephone conversation between Wright and Lawson on October 4, 1970, and the obtaining of a search warrant on October 6, 1970 for the premises of Dolores Glover, where the appellant was arrested and the drugs were found.

Prior Decisions

On the direct appeal from his judgment of conviction, United States v. Wright, 466 F.2d 1256 (2d Cir. 1972), Wright raised issues relating to the validity of the electronic eavesdrop warrants, particularly the September orders. Among other things, Wright claimed that the authorizations for the wiretaps were defective, in that neither the Attorney General nor his specially designated assistant had given his approval. This Court rejected the argument regarding the propriety of the authorizations on the basis of the then authoritative cases of United States v. Pisacano, 459 F.2d 259 (2d Cir. 1972) and United States v. Becker, 461 F.2d 230 (2d Cir. 1972). The court also questioned whether Wright had standing to challenge the orders. 466 F.2d at 1259-60.

Subsequently the Supreme Court of the United States resolved the authorization issues in United States v. Giordano, 416 U.S. 505 (1974) and United States v. Chavez, 416 U.S. 562 (1974). As a result, and it is conceded by the government below, it is now clear that the April wiretaps were invalid under Giordano, while the March and September orders were Chavez type and thus valid to the extent they were not based on the illegal Giordano-type April orders.

Accordingly, the question of whether the September eavesdropping was tainted by information obtained under the invalid April orders was raised in two jurisdictions -- in the Southern District of New York by this habeas corpus application --

and in the Third Circuit on an appeal from judgments of conviction in United States v. Lawson, ___ F.2d ___ (3d Cir. June 10, 1974). The result was a split in the opinions.

The Third Circuit vacated the convictions and remanded the Lawson case to the District Court for the Eastern District of Pennsylvania for reconsideration in the light of Giordano and Chavez. The District Court then found, in an opinion dated August 23, 1974 (Huyett, J.) (reproduced in appellant's appendix), that the April order was defective under Giordano, and the September order was tainted by information learned from the defective tap. Thus, the court suppressed any and all evidence obtained as a result of the September order.

In the petition below, new information appeared which led the court below to concede that Wright had standing to contest the September tap (see Point I, infra). Judge Werker also found that the April tap was illegal under Giordano. The court concluded, however, that the September tap was not tainted by information learned from the illegal April tap, thus disagreeing with Judge Huyett's opinion in Lawson.

It is appellant's contention that Judge Huyett's opinion is the more persuasive one and should be followed by this Court in its review of Judge Werker's opinion below (see Point II, infra).

The Wiretap Orders

The wiretapping which led to the uncovering of apartment number 5, James Wright and the narcotics was ordered on

three different occasions. The first order was obtained on March 31, 1970, the second on April 20, 1970, and the third on September 21, 1970.

On March 31, 1970, simultaneously, orders were entered by Judge John W. Lord, Jr., for the Eastern District of Pennsylvania and Judge Mitchell H. Cohen for the District of New Jersey, authorizing surveillance of the Lawson telephone numbered 609-767-8521 at his residence in Atco, New Jersey, and attachment of a mechanical device to a telephone of Up-Look Records at 651 South 52nd Street, Philadelphia, Pennsylvania, numbered 215-747-8140. The order expressly provided that the authorization terminate twenty days from the date of the orders.

On April 21, 1970, on further application, an order was entered by Judge Cohen authorizing installation of an additional mechanical device on another telephone of the defendant Lawson at his Atco, New Jersey residence, numbered 215-WA 5-4752, and this order provided further that the device authorized by the previous order of March 21, 1970 be allowed to remain in place for an additional period of fifteen days. Simultaneously, in the Eastern District, Judge Lord entered an order extending surveillance to an additional number of Up-Look Records in Philadelphia, Pennsylvania numbered 215-747-8141, and extending authorization for the surveillance of the telephone line described in the March 31 order for an additional period of fifteen days.

The April 21, 1970 orders for surveillance of the

telephone lines first identified in those orders were limited to a period of fifteen days from their entry and this period expired simultaneously with the fifteen-day extension of the twenty-day period authorized by the original orders of March 31, 1970. The last day including both the new surveillance and the extended surveillance begun under the first pair of orders was May 5, 1970. The ninetieth day after March 5, 1970 was August 3, 1970.

On September 21, 1970 Judges Cohen and Lord, for their respective districts, entered orders for resumed surveillance of Lawson on telephone line 215 WA 3-5579 for a period of 15 days from date, i.e., for a period to expire October 6, 1970. These orders, together with supporting affidavits, application and authorization are reproduced in appellant's appendix.

POINT I.

THE APPELLANT WRIGHT HAS STANDING

In the opinion on the direct appeal, United States v. Wright, 466 F.2d 1256 (2d Cir. 1972), the Court questioned whether Wright had standing to raise claims directed to the electronic eavesdropping.

> "And nothing in the record suggests that he was a party to any conversation seized under the authority of the challenged September 1970 order, or that, if he were a party to such a conversation, that conversation was actually used to obtain the October search warrant." Id. at 1260

Both of these questions have now been answered, however, in a manner indicating that Wright has standing to attack the September wiretap. Indeed, the court below conceded the point (Op., p. 4). For the affdiavit of Agent Cassidy (Ex. L) dated October 8, 1974, filed in connection with the habeas corpus application below (and two years after this Court's opinion in Wright) shows first that a telephone conversation between the appellant and Lawson was electronically intercepted on the late afternoon of October 4, 1970 and secondly, that Lawson told Wright he would send a female to Wright to pick up some heroin in the morning. Furthermore, "after listening to the conversation again, I [Cassidy] immediately instituted arrangements" for the surveillance which led directly to Wright.*

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* It should be noted that in the search warrant application Agent Cassidy attributed the surveillance of Lawson on October 6 to an intercepted conversation on October 5 between an unidentified female and Lawson, and this

Thus, in addition to being a party whose voice was intercepted, the interception of appellant's voice led directly to the events culminating in the search of the apartment and his arrest two days later. Consequently, and as was conceded below, Wright has standing.

(Continued)

Court, in reviewing the facts leading to the search warrant, was under the impression that the October 5 call, in which Wright was not a participant, precipitated the surveillance and the search warrant application. 466 F.2d at 1257-8. But it is now apparent from Cassidy's later affidavit (which does not even mention an October 5 call between an unidentified female and Lawson) that the crucial surveillance and the probable cause information for the search warrant stemmed from the intercepted Wright-Lawson call on October 4, and not some other later interception.

POINT II.

THE EVIDENCE DISCOVERED IN APARTMENT 5 AT 146 WEST 120TH STREET SHOULD HAVE BEEN SUPPRESSED SINCE THE SEARCH WARRANT FOR THE PREMISES WAS PREDICATED ON THE FRUITS OF ILLEGAL WIRETAPPING

The government conceded, and Judges Huyett and Werker in United States v. Lawson and in this case have found, that the April wiretap was defective under the decision in United States v. Giordano, 416 U.S. 505, supra. The two decisions depart, however, on the issue of whether the September wiretapping must also fall as a result of the unlawful April orders.

In United States v. Giordano, supra, the Court held that even where a later extension order conformed to the authorization procedure approved in United States v. Chavez, 416 U.S. 562, supra, the extension order and evidence derived from it are nevertheless subject to suppression because of the invalidity of the initial wiretap order.

> "In our view, the results of the conversations under the initial order were essential, both in fact and in law, to any extension of the intercept authority. Accordingly, communications intercepted under the extension order are derivative evidence and must be suppressed."
> 416 U.S. at 533

Judge Werker's opinion below distinguishes this case from Giordano by pointing out that the September order in this case was not an extension of the April order, but was rather an original wiretap order, although obtained after only a short hiatus between the end of the April order and its extensions on August 3 and the application for the September order. Yet

this is a distinction without a difference, since the September order, while technically an original one, was in fact based substantially, indeed almost wholly, on information derived from the April order.

In United States v. Wac, 498 F.2d 1227 (6th Cir. 1974) the Court of Appeals recognized that whether the second order was denominated a new one or an extension does not matter, where the second order was in fact based upon information derived from the first one.

> "Though the second application in this case was not literally for an extension order since it added a new suspect and several new telephones, it was filed immediately upon expiration of the first order and related primarily to the same persons and locations. Not being an application for an extension, it was not controlled by § 2518(1)(f). In this respect the present case differs from Giordano and it cannot be said that the results of the conversations overheard pursuant to the first order were 'essential in law' to issuance of the second order. Nevertheless, a significant portion of the supporting affidavit filed with the second application consisted of transcripts of conversations overheard and lists of calls monitored pursuant to the first order. This information was relied upon by the applicant and presumably considered by the district judge who granted the second order. While not essential in law under the circumstances of this case, we deem the results of the first order to be 'essential in fact' to the granting of the second order."

* * *

> "There is no indication that the standard of exclusion to be applied to illegally obtained information disclosed in an application relied upon to grant a new order is less stringent than that applied to illegally obtained information disclosed in an application relied upon to grant an extension. The words 'derived therefrom' clearly extend the right of exclusion beyond evidence directly obtained as a result of a surveillance order. This appears to be a codification of the 'fruit of the

poisonous tree' doctrine. Nardone v. United States, 308 U.S. 338, 341 (1939). See United States v. Giordano, supra, dissenting opinion of Mr. Justice Powell, 416 U.S. at 558-561. The record demonstrates a connection between the results of the first order and the asserted need for the second. The reliance on those results in support of the second application indicates that this connection had not 'become so attenuated as to dissipate the taint.' Nardone, supra, 308 U.S. at 341; Wong Sun v. United States, 371 U.S. 471, 491 (1963)."

498 F.2d at 1231-2

Indeed, the court in Wac went on to hold that evidence derived from the execution of a search warrant, which in turn was based on information from the second wiretap, must also be suppressed.

"We conclude that all evidence obtained from the interception of communications pursuant to the district court orders of November 22 and December 8, 1971 and items seized pursuant to search warrants issued in part on the basis of intercepted communications were derived from the illegal order of November 22 and must be suppressed."

498 F.2d at 1232

Though Judge Werker also concluded that sufficient probable cause for the September order existed independently of information culled from the illegal orders (Op., p. 5), Judge Huyett in United States v. Lawson disagreed.

"A review of the application filed in support of the order to intercept 215-923-5579 establishes the essentiality in fact of the unlawful April surveillance. The application states that since April of 1970 when the electronic surveillance began the government agent had conducted extensive surveillance of Lawson and his group. This surveillance developed approximately eight more confidential informants on Lawson's operations. By utilizing leads from the electronic surveillance and tied together by additional corroborated informant information, the government had established that Lawson was part of a major narcotics network. (Exhibit 6 at 3)

"The affidavit continues with numerous references

> to the results obtained by the unlawful April surveillance. Although the government learned of the existence of 215-923-5579 independently of the unlawful surveillance, it is clear from the affidavit in support of the September application that a good deal of information resulting from the unlawful surveillance supported the contention that the 215-923-5579 number was being used for illegal purposes. On at least four occasions specified in Agent Cassidy's affidavit the unlawful surveillance refers to arrangements for conversations over the 215-923-5579 number. (Exhibit 6 at 4-5).
>
> "Based on this information we must conclude that the results of the April 20 and 21st surveillance were essential in fact to the granting of the September surveillance order. It is, therefore, clear that any evidence obtained from the September 21st order must also be suppressed."

(Opinion of Judge Huyett, pp. 4-5)

Close scrutiny of the September and April orders bears out the correctness of Judge Huyett's assessment. Indeed, there is virtually no new information which had been developed from the time the April order and its extensions expired on August 3 until the September 21 application was made. Not one fact is presented about Lawson or anyone else for the first three weeks of September, while only a meager addition is made for Lawson in the last week of August.

The affidavit breaks down the information into several categories. The first, under Part II of the affidavit, refers to information gathered from previous electronic monitoring which related to Lawson's involvement in narcotics trafficking. This section describes in great detail telephone intercepts under the April orders which, as Agent Cassidy interpreted it, "has definitely confirmed Lawson's involvement in narcotics traffic" (Aff., p. 3). Most importantly, on April 30 Lawson even called

212-666-5855 (the number at the Dolores Glover apartment which was the subject of the search warrant) and asked for "Jimmy" in order to arrange a cocaine delivery. When Lawson was told that "Jimmy" was not there, he asked that "Jimmy" call him back at 215-923-5579. New York Telephone Company records showed a call the next day from the New York number to 215-923-5579 (Aff., p. 4). This number is the specific number which the September application sought to wiretap and when it was tapped, it revealed the conversation on October 4 with James Wright and led to the search warrant.

The affidavit also describes information from "surveillance" which ends on June 26, 1970. The facts in the subsection entitled "investigation" end on May 28, while the analysis of telephone records in Part III of the affidavit are confined to March and April. The most recent facts developed are contained in the section entitled "information" under Part II of the affidavit. This details information received from May through August, and relates mainly to the activities of one Major Coxsom. Lawson was not named by the informant "as being associated with these people" (Aff., p. 6), although earlier wire interceptions, presumably pursuant to the April orders, disclosed "contact with Coxsom." The only mention of Lawson occurs in information from an informant alleging that the informant was told on August 27, 1979 that Lawson was then engaged in handling brown heroin, and that on August 30, 1970 an informant saw Lawson seated in a car with an attache case which is alleged to

have contained brown heroin. Lawson met with other men on that day and money was exchanged (Aff., p. 7a). No activities at all are mentioned after August 30.

It is therefore completely clear that the September order was in fact substantially based upon information and leads derived from the illegal April orders. Accordingly, as stated in United States v. Wac, 498 F.2d 1226, 1232, supra, "the record demonstrates a connection between the results of the first order and the asserted need for the second. The reliance on those results in support of the second application indicates that this connection had not 'become so attenuated as to dissipate the taint' ". Thus, the results of the September tap, including the conversation with Wright on October 4, the search warrant which directly derived from it, and the evidence uncovered upon execution of that warrant must be suppressed. The writ should therefore issue.

CONCLUSION

The order below should be reversed.

Respectfully submitted,

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